Supreme Court, U.S.
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No. 96-1630

In The

Supreme Court of the United States

October Term, 1996

BEISWENGER ENTERPRISES CORP.,

Petitioner,

v.

KATHLEEN CARLETTA and ELNORA MYERS,
As Personal Representative Of The
Estate Of George Myers,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether multiple claimants may pursue their common law remedies in state court pursuant to the "savings to suitors" clause of 28 U.S.C. § 1333(1) while affording a shipowner the protection contemplated by the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, by stipulating to the priority of their claims and providing the same protective stipulations required of a single claimant who wishes to pursue his common law rights?

NAMES OF THE PARTIES

The following individuals claim through Elnora Myers, as Personal Representative, and their names do not appear in the caption:

Julian Myers
George Myers, Jr.
Shante Myers
Tiffany Carter

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STATUTES INVOLVED OTHER THAN THOSE SET FORTH IN THE PETITION

28 U.S.C. § 1333(1)

The district courts shall have original jurisdiction, exclusive of the States, of:

> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

STATEMENT OF THE CASE

On December 4, 1990, George Myers and his fiancee, Kathleen Carletta, went parasailing off Clearwater Beach, Florida. When the wind picked up, they were cut loose from the vessel. Kathleen Carletta ended up in the Gulf of Mexico and was injured. George Myers was dragged over land and killed.

Anticipating its liability for these events, Petitioner Beiswenger Enterprises Corp. ("Beiswenger"), the owner of the parasailing vessel, invoked the district court's admiralty jurisdiction and petitioned for exoneration and limitation of its liability to the value of the vessel pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, and Rule F of the Supplemental Rules for Certain Admiralty and Maritime claims. Following standard procedure under Rule F, Beiswenger posted a bond for what it believed to be the value of the vessel and pending freight, and the district court entered an injunction providing, *inter alia*, that "the institution and prosecution of any suits . . . of any nature . . . in any court whatsoever

against the Petitioner . . . be and the same are hereby . . . restrained until the hearing and determination of this proceeding. . . . "

The Respondents, Kathleen Carletta and Elnora Myers, on behalf of the Estate of George Myers and his survivors (collectively referred to as the "Claimants"), filed claims against Beiswenger in the limitation of liability action. They also, however, brought suit in state court against other persons and entities responsible for the incident pursuant to the "savings to suitors" clause of 28 U.S.C. § 1333(1). Both actions proceeded on parallel courses until the Claimants moved the district court in late 1994 to lift its injunction and stay the limitation proceeding so that Beiswenger could be added as a defendant in the state court action and the claims could be tried together before a jury.

By late 1994 it had become fairly common for federal courts to balance the savings to suitors clause and the Limitation of Liability Act by permitting multiple plaintiffs whose claims exceeded the value of the vessel to pursue their common law remedies if they were willing, through stipulations, to provide a shipowner with the protection otherwise afforded by the Act. The procedure called for making the case the functional equivalent of a single claimant case through stipulations prioritizing the various claims, thus eliminating the need for *concursus*, and then having the claimants enter into the stipulations which, under the Court's decision in *Langnes v. Green*, 282 U.S. 531 (1931), and cases that followed, permit a single claimant whose claim exceeds the value of the limitation fund to pursue his or her common law remedies in state court. This course of action had been sanctioned by each

Circuit Court of Appeals that had considered it, and this Court had already declined to review one of those decision on certiorari.

After requiring some changes to correct perceived deficiencies in the Claimants' stipulations, the district court followed the above procedure and granted the Claimants' motion to lift the injunction based upon the their agreement that: Beiswenger had the exclusive right to litigate the limitation of liability issue and have the value of its vessel determined in federal court; that any res judicata effect a state court judgment might have on these issues was waived; that no action would be taken to enforce any state court judgment against anyone that might expose Beiswenger to liability in excess of the value of its vessel prior to a determination of its limitation rights in federal court; and that, if Beiswenger was found to be entitled to limit its liability, the limitation fund would go first to discharge any fees or costs Beiswenger might owe to third parties, second to satisfy the claim of the Personal Representative of George Myers' Estate, and last to satisfy the claim of Kathleen Carletta. (Appendix "A" to Petition, pp. 8a-10a).

Beiswenger appealed the district court's decision to lift the injunction to the Eleventh Circuit, which sanctioned the use of the procedure followed by the district court as being in keeping with both the teachings of this Court and the decisions of other Circuit Courts of Appeals:

> Although no prior case in this Circuit has employed the foregoing stipulation method to transform a multiple-claims-inadequate-fund case into the functional equivalent of a single

> claim case, we follow the numerous decisions cited above in doing so today. As an initial matter, we note that the Supreme court has approved the use of stipulations in other contexts to accomplish similar purposes.

(86 F.3d at 1039, Petitioner's Appendix, pp. 17a).[1]

The reasons Beiswenger gives for granting a writ of certiorari are all based upon one of two premises. The first is that, by failing to require the Claimants to concede Beiswenger's right to limit its liability through stipulations reducing the value of their claims to the amount of the limitation fund, the decision of the Eleventh Circuit conflicts with the decision of this Court in *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957), and the decisions of five other Circuit Courts of Appeals. As set forth below, however, such a requirement neither exists nor makes sense. Rather, the approach taken by the Eleventh Circuit is completely consistent with the decisions of both this Court and the other Circuit Courts of Appeals.

The second premise is that, by failing to make the Claimants waive any res judicata effect a state court judgment might have on liability as well as the limitation issues, as opposed to just on the limitation issues, the

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[1] The Eleventh Circuit did, however, vacate the district court's order lifting the injunction until such time as the Claimants amended their stipulations to provide Beiswenger with certain additional protection unrelated to any issue raised in the Petition For Writ of Certiorari. (86 F.3d at 1044-1045, Petitioners' Appendix, pp. 28a-30a). On remand, the Claimants made these amendments so that the stay could again be lifted. The state court trial is set for August 18, 1997.

decision of the Eleventh Circuit conflicts with other decisions in that Circuit and undermines the maritime jurisdiction of federal courts in actions brought under the Limitation of Liability Act. Again, however, neither the requirement nor the perceived conflict exists. By leaving the issue of liability to the state court, and the limitation issues to the district court, the Eleventh Circuit balanced the dictates of the savings to suitors clause and the Limitation of Liability Act the same way numerous other federal courts have done.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict With This Court's Decision In *Lake Tankers Corp. v. Henn*

When a shipowner asserts the right to limit its liability under the Limitation of Liability Act, federal district courts have exclusive jurisdiction to determine the limitation issues, *Ex Parte Green*, 286 U.S. 437, 439-440 (1932), and claimants are not entitled to a jury trial. This exclusive jurisdiction can deprive claimants of the right to pursue their common law remedies before a jury – rights which are preserved for admiralty plaintiffs in general under the "savings to suitors" clause of 28 U.S.C. § 1333(1). The result, as noted by numerous courts and as described by the Second Circuit in *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 754 (2d Cir. 1988), is

> a recurring and inherent conflict in admiralty law: the apparently exclusive jurisdiction vested in admiralty courts by the Limitation of Liability

> Act versus the presumption in favor of jury trials and common law remedies embodied in the 'savings to suitors' clause of 28 U.S.C. § 1333 (1982).

Accord, e.g., In re McCarthy Bros. Co./Clark Bridge, 83 F.3d 821, 826 (7th Cir. 1996); *Gorman v. Cerasia*, 2 F.3d 519, 524 (3d Cir. 1993); *Magnolia Marine Transp. Co. v. Laplace Towing Corp.*, 964 F.2d 1571 (5th Cir. 1992).

The Court has dealt with the tension between these statutes before, and its decisions form the basis for several exceptions to exclusive federal jurisdiction which ameliorate the conflict. From *Langnes* and *Ex Parte Green* come what is known as the "single claimant" exception, whereby district courts must abstain from exercising jurisdiction and lift their injunctions if there is only one claim, and if the claimant is willing to concede the shipowner's right to litigate the limitation issues in federal court free of any res judicata effect a state court judgment might have. *See, e.g., Gorman v. Cerasia*, 2 F.3d at 524; *S&E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 643-644 (6th Cir. 1982); *In re Red Star Barge Line, Inc.*, 160 F.2d 436 (1947).

Similarly, the Court's decision in *Lake Tankers*, solidified an "adequate fund" exception whereby district courts must lift their injunctions even when there are multiple claims if the value of the vessel and its cargo exceeds the aggregate total of the claims against the shipowner. *E.g., Gorman*, 2 F.3d at 524; *S&E Shipping Corp. v. Chesapeake of Ohio Ry Co.*, 678 F.2d at 643-644; *In re Trinidad Corp.*, 229 F.2d 423, 428 (2d Cir. 1955).

The foundation for both of these exceptions is the premise that, if the shipowner does not need or can otherwise be afforded the protection of the Act, claimants should be allowed to pursue their common law remedies and their right to a jury trial. As the Court explained in *Lake Tankers*:

> The state proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control. It follows that there can be no reason why a shipowner, under such conditions, should be treated any more favorably than an airline, bus, or railroad company. None of them can force a damage claimant to trial without a jury. They, too, must suffer a multiplicity of suits. Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions.

354 U.S. at 153 (citations omitted).

The instant case does not fit within either of these longstanding exceptions because it involves multiple claimants and a limitation fund that is inadequate. In recent years, however, the federal courts have recognized that, through the expanded use of stipulations, a shipowner can be afforded the protection of the Act so that claimants can proceed in state court even in multiple claimant – inadequate fund cases. This has been accomplished by expanding the stipulations historically required in a single claimant case to reflect the existence of multiple claimants, and by adding a requirement that all of the claimants stipulate to the priority of their

claims. The modified single claimant stipulations give the shipowner the protection the Court found sufficient in *Langnes*, and the priority stipulations eliminate the need for a *concursus*. As the Third Circuit explained this use of priority stipulations:

> [S]everal courts of appeal have permitted the use of priority stipulations to convert what would otherwise constitute a 'multiple-claims-inadequate-fund' case into the equivalent of a single claim case, thereby eliminating the need for a *concursus*. As the court in *Magnolia Marine Transport* explained, '[m]ultiple claimants may reduce their claims to the equivalent of a single claim by agreeing and stipulating as to the priority in which the claimants will receive satisfaction against the shipowner from the limited fund.'

Gorman v. Cerasia, 2 F.3d at 525 (citations omitted) (quoting *Magnolia Marine Transp. Co. v. Laplace Towing Corp.*, 964 F.2d at 1576. *Accord, In re Dammers*, 836 F.2d at 756. None of the cases require the stipulation Beiswenger seeks – that the aggregate of the claims will not exceed the limitation fund. Rather, they sanction the same procedure followed by the Eleventh Circuit in this case. (86 F.3d at 1038-1039, Petitioner's Appendix, pp. 16a-17a).

To promote the appearance of conflict between the Court's decision in *Lake Tankers* and the Eleventh Circuit's decision in this case, Beiswenger misconstrues the narrow holding in *Lake Tankers* and ignores the broader one. *Lake Tankers* was a multiple claimant case in which the claimants had agreed, for whatever reason, to reduce their claims so that the aggregate was less than the limitation fund. The issue before the Court was whether, given this

circumstance, the claimants could proceed in state court. The Court held that they could. However, contrary to Beiswenger's suggestion, the Court in no way held that such a stipulation was the only method by which multiple claimants could afford a shipowner sufficient protection to be allowed to proceed in state court. Instead, the Court pointed the way to future exceptions with a broader holding – that a shipowner, "so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties in damage actions." 354 U.S. at 153.

The Circuits which, along with the Eleventh Circuit, have approved the use of priority stipulations in multiple claimant – inadequate fund cases do not share Beiswenger's view that the procedure conflicts with *Lake Tankers*. Rather, they are of the view, and correctly so, that the procedure flows directly from the teachings of *Lake Tankers*. *E.g.*, *Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, 404-405 (5th Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994), *appeal after remand*, 74 F.3d 671, *cert. denied*, ___ U.S. ___, 117 S.Ct. 79 (1996) (Sanctioning the procedure because " . . . the Supreme Court explained in [*Lake Tankers*] that liability may and should be limited consistent with preserving the claimants' right to proceed in the fora of their choice."); *Magnolia Marine*, 964 F.2d at 1576 (Approving multiple claimant stipulations because, under *Lake Tankers*, "the provisions of the Act . . . do not control" when "the state court proceeding could have no possible effect on the [shipowner's] claim for limited liability. . . . "); *In re Dammers*, 836 F.2d at 759 (2d Cir. 1988) (Approving multiple claimant stipulations because the Court in *Lake Tankers* "explained" that "the shipowner, so long as

his claim of limited liability is not jeopardized, is subject to all common-law remedies available against other parties. . . . ").

The Court also apparently agrees that there is no conflict, having twice declined to review cases which approved of the use of priority stipulations in multiple claimant – inadequate funds cases without requiring a concession that the claims would not exceed the limitation fund. *Odeco Oil & Gas Co. v. Bonnette*, 4 F.3d 401, *cert. denied*, 511 U.S. 1004; *In re Port Arthur Towing Co. v. John W. Towing, Inc.*, 42 F.3d 312 (5th Cir.), *cert. denied sub nom. Jarreau v. Port Arthur Towing Co.*, ___ U.S. ___, 116 S.Ct. 87 (1995).

In short, in deciding this case the Eleventh Circuit simply followed the Court's lead in *Lake Tankers*.

II. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals

In a somewhat confusing discourse, Beiswenger also suggests that the Eleventh Circuit's decision in this case conflicts with decisions in five other Circuits because the Eleventh Circuit did not require the Claimants to concede Beiswenger's ultimate right to limit its liability by stipulating to the adequacy of fund. However, none of these cases require such a stipulation, and most affirmatively show that it is unnecessary.

In *Gorman*, the Third Circuit acknowledged the viability of the priority stipulation approach in a multiple claimant – inadequate fund case but reversed the district court's decision to lift its limitation injunction because the

claimants' stipulations were not adequate to protect the shipowner. The perceived inadequacies, however, had nothing to do with the claimants stipulating to a reduction in the amount of their claims or otherwise conceding that the shipowner was entitled to limit his liability. To the contrary, the stipulation on this point, which the Third Circuit found acceptable, was like the one in this case:

> In the event that a judgment is recovered in any state court action against *Gorman* that exceeds the fund representing the value of the plaintiff's vessel, neither party will seek to enforce the judgment against *Gorman* pending adjudication of the Limitation of Liability action in this Court . . .

2 F.3d at 522.

In *Magnolia Marine*, the Fifth Circuit was concerned with issues not involved in this case: whether an insurance company has standing to assert a shipowners' limitation rights, and whether a district court can entertain a claim for declaratory relief to interpret the shipowner's policy. The claimants in *Magnolia Marine*, like those in *Lake Tankers*, had agreed to limit their claims to the value of the fund, so there was no issue concerning the adequacy of the stipulations. 964 F.2d at 1576 n.1. The Fifth Circuit did, however, acknowledge the priority stipulation approach used by the Eleventh Circuit in this case:

> Multiple claimants may reduce their claims to the equivalent of a single claim by agreeing and stipulating as to the priority in which the claimants will receive satisfaction against the shipowner *from the limited fund.*

964 F.2d at 1576 (citation omitted) (emphasis added).

Beiswenger suggests that the Fifth Circuit's phrase "from the limited fund" refers to a concession that the shipowner can limit its liability. The reference, however, is simply to the situation that would exist if and when the shipowner proved its right to limit its liability. This is made clear both by a moment's thought and by other decisions in the Fifth Circuit. *Lake Tankers* permits multiple claimants to proceed in state court if they agree that the aggregate of the claims will not exceed the limitation fund. No priority stipulations are needed if the claims are less than the fund, and none are required by *Lake Tankers*. Priority stipulations only become important if the total of the claims exceeds the fund, *i.e.* when there is no agreement to reduce the value of the claims, because at that point they act as a substitute for a *concursus*. The Fifth Circuit's understanding of this dynamic is demonstrated by its prior and subsequent approval of stipulations in multiple claimant – inadequate fund cases which did not include a stipulation that the claims would be less than the fund. *See In re Two "R" Drilling Co.*, 943 F.2d 576 (5th Cir. 1991); *Odeco*, 4 F.3d 401.

In *In re Dammers*, the Second Circuit affirmed the use of priority stipulations in a multiple claimant – inadequate fund case without requiring the claimants to reduce the aggregate of their claims to the value of the fund. In fact, the Circuit Court expressly rejected the notion that multiple claimants must concede a shipowner's right to limit its liability as part of the price of proceeding in state court:

> As we have held, a claimant need not concede a shipowner's ultimate right to have its liability limited, only the shipowner's right to have that

> matter adjudicated exclusively in the admiralty court.

836 F.2d at 758 (citation omitted).

The Eighth Circuit was perhaps the first Court of Appeals to approve the use of priority stipulations to create the functional equivalent of a single claimant case. In *Universal Towing Co. v. Barrale*, 595 F.2d 414 (8th Cir. 1979), a multiple claimant – inadequate fund case existed because the widow of a deceased seaman sought $2,000,000 when the limitation fund was $85,000, and because there was a third party indemnity claim against the shipowner which included a claim for fees and costs. The claimant did not agree to reduce her claim, as Beiswenger argues is required, but she did agree to permit the claim for fees and costs to have first priority against the limitation fund – just as the Claimants did in this case. She then argued "that by filing her consent to [the third party] claim for attorneys' fees and costs, she . . . reestablished a one-claim situation." 595 F.2d at 410. The Eighth Circuit agreed and reversed the district court for refusing to dissolve the limitation injunction – a decision wholly consistent with the Eleventh Circuit's decision in this case. The portion of the *Universal Towing* decision Beiswenger quotes in its Petition, which describes the two standard exceptions to admiralty jurisdiction in limitation cases, was simply part of the Eighth Circuit's historical review. Its holding was that the priority stipulation approach is another viable exception.

Lastly, Beiswenger purports to find conflict between the Eleventh Circuit's decision in this case and the Sixth Circuit's decision in *S&E Shipping*. Again, no conflict

exists. The Sixth Circuit had before it a multiple claimant – inadequate fund case in which the claimants tried to have the district court's injunction lifted through the use of priority stipulations. The Sixth Circuit noted that the Eighth Circuit had permitted this in *Universal Towing*, but did not reach the issue because the stipulations were filed late and were "not properly brought before this court. . . . " 678 F.2d at 641. As with its analysis of *Universal Towing*, the portion of the opinion Beiswenger quotes in its Petition is a recap of prior history, not the Sixth Circuit's holding or view on the use of priority stipulations in multiple claimant – inadequate fund cases.

Contrary to Beiswenger's position, then, reality is that every Circuit Court of Appeals that has decided the question has sanctioned the use of priority stipulations to reduce a multiple claimant – inadequate fund case to the functional equivalent of a single claimant – inadequate fund case. Once that is accomplished, the claimants can pursue their common law remedies in state court by providing the protective stipulations long recognized in single claimant cases. Such harmony among the Circuits dictates denying, not granting the writ Beiswenger seeks.

III. The Decision Below Does Not Conflict With Other Decisions Of The Eleventh Circuit

Apart from the questionable significance of intra-circuit conflict, Beiswenger's claim that review is warranted because the Eleventh Circuit's decision in this case conflicts with its decisions in *American Dredging Co. v. Lambert*, 81 F.3d 127 (11th Cir. 1996), and the old Fifth

Circuit's decision in *Tittle v. Aldacosta*, 544 F.2d 752 (5th Cir. 1977), is frivolous.

Beiswenger's complaint is that the Claimants were only required to waive the res judicata effect of a state court judgment on the issue of Beiswenger's right to limit its liability, thus allowing any jury verdict and consequent state court judgment on the question of liability to stand. Not surprisingly, Beiswenger would like the right to retry that issue in federal court as a safety net. No case or statute, however, gives Beiswenger that right.

Neither the Eleventh Circuit's decision in *American Dredging* nor the old Fifth Circuit's decision in *Tittle* even address the question of whether a state court's finding of liability is or should be binding when a case returns to federal court for trial on the limitation issues. Those cases involved a trial of both liability and the limitation issues, *i.e.* knowledge and privity, in federal court. The procedure they describe – first determining what acts of negligence caused the injury and then whether the shipowner was in privity with or had knowledge of those acts – is certainly appropriate in that context. The cases do not hold, however, that the same court must determine both issues, much less that a state court cannot determine one while a federal court determines the other. And that, of course, is precisely the way it is supposed to be done to satisfy the conflicting dictates of the savings to suitors clause and the Limitation of Liability Act. *See, e.g., Langnes*, 282 U.S. at 543-544; *In re McCarthy Bros. Co./Clark Bridge*, 83 F.3d at 828; *In re Great Lakes Dredge & Dock Co.*, 162 F.R.D. 160, 164-165 (M.D. Fla. 1995).

IV. The Decision Below Does Not Undermine Federal Maritime Jurisdiction

Beiswenger's final lament that things are not as they should be in Mobile, Tampa and Savannah is based on two misconceptions. The first is that things are different elsewhere. As pointed out above, the procedure followed by the Eleventh Circuit in this case is followed in every Circuit that has considered whether priority stipulations can be used to afford claimants their rights under the savings to suitors clause in multiple claimant – inadequate fund cases.

Beiswenger cites *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960), in support of its argument that things are different in the Fifth Circuit, but it misreads the case. The *Pershing* Court was confronted with a multiple claimant situation in which some, but not all of the claimants were willing to enter into protective stipulations. Under these circumstances, the claimants were properly kept in federal court. However, both the Eleventh Circuit in this case, 86 F.3d at 1039-1041, and the Fifth Circuit itself have correctly distinguished this situation from one in which all of the claimants are willing to provide the necessary stipulations:

> If the claimants' stipulation here covers *all* possible claimants and assures [the vessel owner] would never have to pay more than limitation fund if the admiralty court so determines, this case is instantly distinguishable from *Pershing Auto Rentals v. Gaffney*, 279 F.2d 546 (5th Cir. 1960). In that case, written shortly after *Lake Tankers*, only two out of four claimants offered to execute protective stipulations. The sum of

> the multiple claims still far exceeded the limitation fund.

Odeco, 4 F.3d at 405 n.7. (citations omitted).

Beiswenger's second misconception is that the Limitation of Liability Act gives it the right to have its liability determined in a non-jury trial in federal court. It is because of this belief that Beiswenger rails against the procedure approved by the Eleventh Circuit:

> In every case, it would be possible for multiple claimants to make stipulations which would not be at all harmful to themselves but would meet this Eleventh Circuit rule avoiding a *concursus* and thereby securing jury trials of liability and damage issues [in state court].

(Petition for Writ of Certiorari, p. 18). The Act, however, is only designed to limit a shipowner's liability if it can prove that it had no privity or knowledge. It is the savings to suitors clause which speaks to the question of a claimant's remedies, and it gives claimants a right both to common law damages and a jury trial. In short, Beiswenger seeks to enforce rights which this Court, in a holding worth repeating, has already said that shipowners do not have:

> [T]here can be no reason why a shipowner . . . should be treated any more favorably than an airline, bus or railroad company. None of them can force a damage claimant to trial without a jury. . . . Likewise, the shipowner, so long as his claim of limited liability is not jeopardized, is subject to all common-law remedies

> available against other parties in damage actions.

Lake Tankers, 354 U.S. at 153.

CONCLUSION

For the above reasons, it is respectfully submitted that Beiswenger's Petition for Writ of Certiorari should be denied.

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